SUPREME COURT, U. S.

FILED

No. 838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MONTANA POWER COMPANY, *Petitioner*,

v.

FEDERAL POWER COMMISSION, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND THE SECRETARY OF THE INTERIOR, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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The briefs in opposition filed by the Solicitor General and the Tribes warrant several brief comments.

1. The attempt by the Solicitor General to avoid the conflict between the decision below and the decision of

this Court in *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, ignores the basis upon which the Court's decision rested in that case. His assertion (p. 8) that Section 28—the savings section here—is to be distinguished from the savings provision in *De La Rama S. S.* because it "did not clearly protect procedures written into licenses" is unfounded. The Section 28 language *is* clear, and comprehensive—*no* subsequent amendment of the Act "shall affect any license theretofore issued." The alleged support for a construction of Section 28 that supports the decision below in *Pennsylvania Power & Light Co.* v. *FPC*, 139 F.2d 445 (3d Cir. 1943), *cert. denied*, 321 U.S. 798 has already been refuted in the petition (p. 10n).

2. Nor is there substance to the suggestion that the result below can be supported because it avoids having some readjusted charges involved in the power project determined by arbitration and some by the Commission (U.S. p. 9). There are two separate licenses involved in the project, and the Commission had no trouble in dealing with the second one separately when it fixed an appropriate initial rental. There is no reason to believe that it would be any more difficult for the Commission again to determine under Section 10(c), at the proper time, an appropriate readjusted charge for the second license after the readjusted charge for the original license has been fixed by an arbitrator.

3. There is no merit in the suggestion by the Tribes (pp. 2-6; see also U.S. p. 8n) that the decision below can be sustained on some ill defined theory of waiver or estoppel arising from the amendment to the Company's license in 1936 to extend the period provided

for construction of the project. The suggestion was rejected on the only occasion when it was considered by the court below (A. 59a-60a). Indeed, if the 1936 license amendments have any relevance, they add support to the position of the Company.

The 1936 license amendment had nothing to do with the amended Section 10(e). It differed from an earlier 1932 amendment, which had also extended the construction period, in that by 1936 the Tribes had become organized, and hence, as the amendments' recitals spell out, the Secretary did not give his approval until the Company had secured written concurrence in the amendments from the Tribes. What may be significant is that despite the fact that Section 10(e) had been amended in 1935 to give authority to the Commission to fix readjusted annual payments, and despite the fact that the 1936 license amendments changed the very section of the license which contained the arbitration provision, that provision remained unchanged.

4. The suggestion by the Tribes (pp. 7-8) that arbitration will prevent their being heard is wholly without merit. The Company has on several occasions announced that it will not object to the Tribes being recognized as parties to the arbitration proceedings in their own right. In any event, the Commission, which the Tribes are quite anxious to have as the judge of their contentions, will be a party and presumably will be equally effective as an advocate of their interests. The Secretary, as their trustee, will also be a party and will be guided by the interest of the Tribes. Indeed, as the Tribes themselves recognize (p. 8n), the Secretary urged the Commission in this proceeding to

fix an even higher readjusted annual rental payment to the Tribes than they themselves demanded.*

Respectfully submitted,

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* Likewise without substance are two contentions by the Tribes, not joined in by the Solicitor General, (1) that the petition should be denied because the decision below does not finally dispose of the case (Tribes, p. 9), and (2) that there is something improper in the Company's actions in adjusting to the possibility of higher Indian rental payments (Tribes, p. 7). As to the first, the issues of jurisdiction *vel non*, and the validity of the Commission's order if it has jurisdiction, are entirely separate, and it is to the advantage of everyone that the jurisdictional issue be settled now. As to the second, both prudence and the Commission order granting a stay of its decision (39 F.P.C. 458) dictated the creation of a reserve to meet future potential liability. The rate increase to which the Tribes refer does not, of course, apply to the 1959-1969 period involved in the current readjustment rentals, and since the Company received less than two-thirds of the rate of adjustment it requested on a number of bases, it cannot be correctly asserted that the Company is now collecting the higher rental from its customers.